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Supreme Court of the United States

OCTOBER TERM, 1906

No. 156

ROCHESTER RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE CITY OF ROCHESTER,
Defendant in Error.

In Error to the Supreme Court of the State of New York.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR

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Plaintiff in Error,
against
THE CITY OF ROCHESTER,
Defendant in Error.

In Error to the Supreme Court of the State of New York.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

This action was brought to recover the sum of $18,274.02, with interest, alleged to be due to the City of Rochester upon account of the city having at its own expense laid pavements in Park Avenue and North St. Paul Street in said city between the tracks, the rails of the tracks and two feet in width outside of the tracks of the Rochester Railway Company; said Rail-

way Company having been given notice to make such pavements and having failed to do so. (Record, pages 3-6.)

The Court of Appeals of the State of New York directed that the Supreme Court award final judgment in favor of the defendant in error and against the plaintiff in error for the amount claimed in the complaint herein, together with interest and costs; and thereupon judgment of the Supreme Court was entered in favor of the defendant in error and against the plaintiff in error, for the sum of $22,556.55, with $1,148 costs, amounting in the aggregate to the sum of $23,704.55. (Record, pages 110, 111.) Thereupon this writ of error was sued out to review said judgment of the Supreme Court of the State of New York.

Ordinances for the construction of the pavements in question were adopted in 1900, and at that time the General Railroad Law of the State of New York (Laws of 1890, Chap. 565) contained the following provisions :

> "The provisions of this article shall apply to every corporation which under the provisions thereof or of any other law has constructed or shall construct *or operate,* or has been or shall be organized to construct or *operate* a street surface railroad *or any extension or extensions,* branch or branches thereof."
>
> *Article* 4, §90, *as amended by Laws* 1895, *Chap.* 933.

> "Every street surface railroad corporation, so long as it shall continue to use any of its tracks on any street, avenue or public place in any city or village, shall have and keep in permanent repair that portion of such street, avenue or public place between its tracks, the rails

> of its tracks, and two feet in width outside of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so and in such manner as they may prescribe. In case of the neglect of any corporation to make pavements or repairs after the expiration of thirty days' notice to do so, the local authorities may make the same at the expense of such corporation."
>
> *Article* 4, §98, *as amended by Laws* 1892, *Chap.* 676.

The Court of Appeals has construed these provisions and held that under that statute "it became and was the duty of the Rochester Railway Company to keep in permanent repair such portions of the street through which it passed as was within its tracks and two feet in width outside, and that the local authorities of that city were vested with the authority of determining when the repairs should be made. * * * The language employed by the legislature is broad enough to include re-pavement as well as repairs."

Conway vs. The City of Rochester, 157 N. Y., 33.

In 1900 an ordinance was passed by the Common Council of the City of Rochester requiring the Rochester Railway Company to pave St. Paul Street from Main Street East to the New York Central & Hudson River Railroad Company's bridge, between the tracks, the rails of the tracks and for two feet outside of the rails of the tracks of said Rochester Railway Company. (Record, page 61.) Thereafter the notice required by the Railroad Law was given to the plaintiff in error requiring it to make such pavements, and said Railroad Company neglected and refused to make such pavement. (Record, page 62.)

Thereafter and on the 9th day of October, 1900, the first ordinance was passed by the Common Council of the City of Rochester ordaining that the paving of St. Paul Street from Main Street East to Central Avenue was necessary and should be made, and that the expense of the work between the tracks, the rails of the tracks and two feet outside of the tracks of the Rochester Railway Company should be charged to and collected from the Rochester Railway Company, and the expense of the remainder assessed upon the abutting property. (Record, pages 62, 63.) Thereafter notice was published in the official papers of the City of Rochester for four days stating that said ordinance would be considered at a certain meeting of the Common Council, in which notice it was stated that a portion of the estimated expense was intended to be charged to and collected from the Rochester Railway Company (Record, pages 64, 65), and on the date set in said notice, the Common Council considered said ordinance and passed a final ordinance directing the construction of said pavements, and directing that the expense of the work between the tracks, the rails of the tracks and two feet outside of the rails of the tracks of the Rochester Railway Company be charged to and collected from the Rochester Railway Company, and that the remainder of the expense be assessed upon the abutting property—the ordinance reciting that the Rochester Railway Company had been notified to make such pavement, and had failed to do so. (Record, pages 65, 67.)

At that time North St. Paul Street was a public street in the City of Rochester (Record, page 61); and the Rochester Railway Company was operating in said street a street surface railroad for public use and the conveyance of persons and property for compensation. (Record, page 67.) Thereafter the defendant in error pursuant to said ordinance constructed a pavement in North St. Paul Street from Main Street East to Cen-

tral Avenue between the tracks, the rails of the tracks and two feet outside of the tracks of the Rochester Railway Company, as well as in the remainder of said street between said points, and expended on account of such improvement between the tracks, the rails of the tracks, and two feet outside of the tracks of said Rochester Railway Company, various sums sought to be recovered in this action. (Record, page 67.)

In July, 1900, the Common Council of the City of Rochester passed an ordinance directing the Rochester Railway Company to pave Park Avenue from Alexander Street to Meigs Street, between the tracks, the rails of the tracks and two feet outside of the tracks of said Rochester Railway Company. (Record, pages 67, 68.) Thereafter the notice required by the Railroad Law was given to said Rochester Railway Company requiring it to make such pavement, and said Railway Company neglected and refused to make such pavement. (Record, page 68.)

On the 4th day of June, 1901, an ordinance was adopted by the Common Council of the City of Rochester, reciting that it was proposed to improve Park Avenue from Alexander Street to Meigs Street by the construction of a medina stone pavement and proposing that the cost of said pavement between the tracks, the rails of the tracks and two feet outside of the tracks of the Rochester Railway Company be charged to said Company and the remainder of the cost of said pavement be assessed upon the abutting property. (Record, pages 68, 69.) Thereafter notice was published for four days in the official papers of the City of Rochester that the Common Council would take action on said ordinance on a certain day. In said notice it was stated that it was intended to charge the cost of paving between the tracks, the rails of the tracks and two feet outside of the tracks of the Rochester Railway Company to said Rochester Railway Company. (Record,

page 69.) Upon the date set in said ordinance, the Common Council considered said ordinance and adopted a final ordinance for the improvement of Park Avenue from Alexander Street to Meigs Street, in which it was directed that the cost of paving between the tracks, the rails of the tracks and two feet outside of the tracks of the Rochester Railway Company be charged to said Railway Company, and that the remainder of the expense be assessed upon the abutting property. (Record, page 70.)

At that time Park Avenue was a public street in the City of Rochester (Record, page 67), and the Rochester Railway Company was operating a street surface railroad therein for public use and the conveyance of persons and property for compensation. (Record, page 71.) Thereupon the defendant in error constructed a pavement in Park Avenue and expended in such work various sums for paving between the tracks, the rails of the tracks and two feet outside of the tracks of the Rochester Railway Company, which sums are sought to be recovered in this action.

The defendant in error is a municipal corporation. (Record, page 30.)

The original Rochester City & Brighton Railroad Company was incorporated on the 31st day of May, 1862, under the provisions of Chapter 140 of the Laws of 1850, for the purpose of constructing, maintaining and operating a street surface railroad from the Town of Brighton, Monroe County, through various streets in the City of Rochester, into the Town of Greece, Monroe County. (Record, page 30.)

On the 24th day of June, 1862, the Common Council of the City of Rochester granted to the said Rochester City & Brighton Railroad Company its consent to the maintenance, construction and operation of a street surface railroad in and through certain streets in the City of Rochester. (Record, page 31.) In the

ordinance it was prescribed that said consent be granted "upon the terms, conditions and stipulations hereinafter prescribed." (Record, page 32.) Among the conditions thus prescribed were the following :

> "Said company shall under the direction of and as required by the Common Council of the City of Rochester, improve with suitable material as such Common Council shall direct and in a proper manner, between its tracks, the rails of its tracks and for two feet and four inches outside thereof, and shall keep the surface of the street inside the rails and for two feet and four inches outside thereof in good repair, and all dirt and filth removed therefrom as may be directed and required by the said Common Council. * *
>
> The said Railroad Company may charge and collect from every person on entering any of their cars or carriages for riding any distance upon said road on the same continuous route, a sum not exceeding five cents, except children under five years of age, accompanied by parents or other persons having them in charge, such children to ride free. * * *
>
> "It is hereby reserved to the Common Council of the City of Rochester to make such further orders, rules and regulations in relation to the construction repairs and operation of said Railroad Company as from time to time may be deemed necessary to protect the interests of said city, and the safety, welfare and accommodation of the public." (Record, page 32.)

The ordinance further provided that the grant should be formally accepted by the Railroad Company within sixty days from the date of the passage of the resolution in such manner as should be approved by the City

Attorney; and on the 8th day of July, 1862, said Rochester City & Brighton Railroad Company accepted the grant "*subject to the provisions and restrictions therein contained,*" and such acceptance was duly approved by the City Attorney. (Record, page 33.)

The Rochester City & Brighton Railroad Company executed a mortgage on its property and franchises. The same was foreclosed, and on the 28th day of February, 1868, the property and franchises of said Railroad Company were sold on a foreclosure sale to Chauncey B. Woodworth, who associated with himself certain other individuals and filed articles of incorporation of a new Rochester City & Brighton Railroad Company, for the purpose of operating a railroad in the City of Rochester, theretofore constructed, maintained and operated by the Rochester City & Brighton Railroad Company "in and through the streets wherein such railroad is now laid and run, and in and through such other streets as the public interests may hereafter require." (Record, pages 33, 34.) After the incorporation of the new company, it petitioned the Common Council of the City of Rochester, "*protesting against the onerous conditions of section two of the said resolution of* 1862." The question was debated for about a year, and on the 12th day of January, 1869, the Common Council amended section two of the ordinance of 1862, so as to read as follows :

> "Whenever it becomes necessary to improve by ordinance or otherwise, any of the streets through which their track is laid with a new or permanent improvement, said company shall not be required to make any part or portion thereof, nor bear any part or portion of the expense of making the same, *during the term of five years from the adoption of this ordinance.*"

And § 6 in relation to fares, was amended to read as follows :

> "Said company may charge and collect from every person on entering any of their cars or carriages for riding any distance upon said road, to or from the extremities at either railway depot, a sum not exceeding five cents, except children under five years of age, accompanied by parents or other persons having them in charge. Such children to ride free, and except also that said company shall not charge nor receive from children under twelve years of age, more than three cents for any of above distances." (Record, pages 34, 35.)

Shortly thereafter *an act was drawn by the Rochester City & Brighton Railroad Company*, a copy of which was transmitted to the Common Council of the City of Rochester by the Mayor thereof, and thereupon the Common Council passed the following resolution :

> "Resolved, That the clerk of this Board be authorized to transmit a copy of the bill relating to street railroads presented by the Mayor to this Board *to the Legislature requesting that body to legalize the action of the Common Council by the passage of said bill.*"

And thereupon the Legislature passed the act known as Chapter 34 of the Laws of 1869. (Record, page 35.)

The plaintiff in error in this action was incorporated on the 25th day of February, 1890, under the provisions of Chapter 252 of the Laws of 1884. (Record, page 42.)

On the 25th day of February, 1890, the Rochester City & Brighton Railroad Company executed and delivered to the plaintiff in error a lease of all its property, franchises, rights and privileges. Such lease was executed under the corporate seal of both companies and ratified by the stockholders of both companies, and was made "*pursuant to the provisions of the Statutes*

of the State of New York in such case made and provided." (Record, page 44.) Thereupon the plaintiff in error acquired "*pursuant to the Statutes of the State of New York in such case made and provided*" the entire capital stock of the Rochester City & Brighton Railroad Company which was surrendered and transferred to the defendant, and a certificate of such surrender filed in the office of the Secretary of State. (Record, page 44.)

In 1890 the plaintiff in error received permission from the Board of Railroad Commissioners of the State of New York to change the motive power of the railroad operated by it from horse power to electricity, and thereafter did equip said road with electrical appliances. (Record, page 45.)

After the passage of Chapter 252 of the Laws of 1884, The Rochester City & Brighton Railroad Company obtained from the municipal authorities of the City of Rochester various consents to extend its tracks into various streets of the City of Rochester "upon the express condition that the provisions of Chapter 252 of the Laws of 1884 pertinent thereto shall be complied with;" and the plaintiff in error since it acquired the property of said Rochester City & Brighton Railroad Company has obtained from the municipal authorities of the City of Rochester various consents to extend its tracks and railroad into the various streets of the City of Rochester upon the condition "that the provisions of Article Four of the Railroad Law pertinent thereto shall be complied with." Both companies acted upon such consents and made extensions into various streets under such consents. (Record, pages 46, 47.)

In December, 1894, the defendant petitioned the Common Council for a ratification and confirmation of the location of its tracks and railroad, saying "these locations have not in many cases been fixed with due and proper formality." (Record, pages 47, 48.)

The Common Council thereupon passed an ordinance confirming such location upon condition "that the provisions of Article Four of the Railroad Law of the State of New York, being an act in relation to railroads constituting Chapter 39 of the General Laws of the State of New York, be complied with." (Record, pages 48, 51.)

Pursuant to the direction of the Common Council a contract was entered into between the city and the Railway Company in which the location of the tracks and railroad was confirmed and ratified, and in which the Rochester Railway Company agreed "to accept and in each and every thing and particular, well and truly to comply with each and all of the provisions and conditions contained and made in the following and accompanying resolution as adopted by the Common Council of said city." Among the resolutions which it agreed to accept was the one requiring compliance with Article Four of the Railroad Law. (Record, pages 49, 50, 51.)

The Court of Appeals upon these facts and upon the authority of Conway vs. City of Rochester, 157 N. Y. 33, decided that the Railroad Law applied to the Rochester Railway Company and required it to pay the cost of paving between the tracks, the rails of the tracks and two feet outside of the tracks of the street railroad operated by it, and that the Legislature could constitutionally impose this obligation upon the plaintiff in error.

POINTS.

I.

The Alleged Immunity from Taxation Being Personal to the Rochester City & Brighton Railroad Company Could not be Acquired by the Plaintiff in Error by Lease or Purchase of Said Company's Property and Franchises, Unless With the Permission of the Legislature of the State of New York. The Decision of the Court of Appeals that the Statutes of the State of New York Did Not Permit This Immunity to Pass to Plaintiff in Error Was Based Upon the Construction of State Statutes, and Thus no Federal Question is Presented. However, the Decision of the Court of Appeals is in Accord with the Construction Placed by This Court upon Similar Statutes.

The Court of Appeals, as one of the grounds of decision in this case, held that any right to exemption from the cost of paving streets which may have been held by the Rochester City & Brighton Railroad Company was personal and did not pass to the plaintiff in error. (Record, pages 100, 101.)

The Rochester City & Brighton Railroad Company was incorporated on the 5th day of March, 1868. (Record, page 34.)

The plaintiff in error, Rochester Railway Company, was incorporated on the 25th day of February, 1890, under an act of the Legislature of the State of New York, known as Chapter 252 of the Laws of 1884. (Record, page 42.)

At the time of the Rochester Railway's incorporation, the Rochester City & Brighton Railroad Company was operating a street railway in the City of Rochester and adjacent territory. The plaintiff in error was authorized by the act under which it was incorporated to lease the road of the Rochester City & Brighton Railroad Company. § 15 of Chapter 252 of the Laws of 1884 reads as follows:

> "§ 15. It shall be lawful for any street surface railroad company or companies to lease or to transfer its or their right, subject to all its or their obligations in respect thereof, to run upon or to use any portion of its or their railroad tracks to any other street surface railroad company authorized to run upon such route, upon such terms as may be agreed upon by a majority of the respective boards of directors thereof, subject to approval or rejection by a vote of a majority of the stock represented at meetings of the stockholders of each of such companies called for that purpose, and held within three months after such agreement shall have been adopted by the several boards of directors. But nothing in this section shall be construed to authorize any railroad company in cities of over three hundred thousand population, to lease its rights or franchises to any other company in said cities which owns and operates a road parallel thereto."

At the time the plaintiff in error leased the property of the Rochester City & Brighton Railroad Company, there was in force an act which authorized the lessee to purchase the stock of the lessor corporation, and thereupon to become vested with all its property, franchises, rights and privileges. This act was Chapter 254 of the Laws of 1867, entitled "An act in relation to railroads held under lease" as amended by Chapter 503 of the Laws of 1879, and reads as follows:

"Any railroad corporation created by the laws of this State, or its successors, being the lessee of the road of any other railroad corporation, may take a surrender or transfer of the capital stock of the stockholders, or any of them, in the corporation whose road is held under lease, and issue in exchange therefor the like additional amount of its own capital stock at par, or on such other terms and conditions as may be agreed upon between the two corporations; and whenever the greater part of the capital stock of any such corporation shall have been so surrendered or transferred, the directors of the corporation taking such surrender or transfer shall thereafter, on a resolution electing so to do, to be entered on their minutes, become ex-officio the directors of the corporation whose road is so held under lease, and shall manage and conduct the affairs thereof, as provided by law; and whenever the whole of the said capital stock shall have been so surrendered or transferred, and a certificate thereof filed in the office of the Secretary of State, under the common seal of the corporation to whom such surrender or transfer shall have been made, the estate, property, rights, privileges and franchises of the said corporation whose stock shall have been so surrendered or transferred, shall thereupon vest in, and be held and enjoyed by the said corporation, to whom such surrender or transfer shall have been made, as fully and entirely, and without change or diminution, as the same were before held and enjoyed, and be managed and controlled by the board of directors of the said corporation to whom such surrender or transfer of the said stock shall have been made, and in the corporate name of such corporation. The rights of any stockholder not

> so surrendering or transferring his stock shall not be in any way affected hereby, nor shall existing liabilities or the rights of creditors of the corporation, where stock shall have been so surrendered or transferred, be in any way affected or impaired by this act."

It is "the established doctrine of this Court in regard to powers of corporations that they are such, and such only, as are conferred upon them by acts of the Legislature" of the State in which they are organized, and a railroad corporation *unless authorized by the Legislature* cannot lease its road and franchises to another, *nor can a railroad corporation without like authority accept a lease of the road and franchises of another railroad corporation.*

> *Oregon Railway & Navigation Company vs. Oregonian Railway Company*, 130 U. S., 1.

A corporation cannot purchase the stock of another corporation without legislative permission.

> *De LaVergne Refrigerating M. Company vs. German Savings Institution*, 175 U. S., 40.

The plaintiff in error on the 25th day of February, 1890, leased the railroad and franchises of the Rochester City & Brighton Railroad Company, and such lease was made, as stipulated by the plaintiff in error and as found by the Court "*pursuant to the provisions of the Statutes of the State of New York in such case made and provided.*" (Record, page 4.) Thereafter in the year 1890, the plaintiff in error as the lessee of the Rochester City & Brighton Railroad Company acquired the entire capital stock of the Rochester City & Brighton Railroad Company, which was surrendered and transferred to the defendant and a certificate of such surrender and transfer was filed in the office of

the Secretary of the State of New York; and it was stipulated by the plaintiff in error and found as a fact herein, that said stock was acquired *"pursuant to the Statutes of the State of New York in such case made and provided."* (Record, page 44.)

Thus the Rochester City & Brighton Railroad Company practically passed out of existence. Its stock was surrendered and it became a company without any stock. Its estate, property, rights, privileges and franchises vested in the Rochester Railway Company, and its affairs were managed and controlled by the directors of the latter corporation. As was said by this Court in a similar case nothing was left of the Rochester City & Brighton Railroad Company "but the memory of its existence, a mere shadow of a name."

Yazoo & Mississippi Valley Railroad Company vs. Adams, 180 U. S., 1.

It no longer had any road to operate and no property or franchises to control or manage. These were vested in the plaintiff in error, and of course, the plaintiff in error in managing, operating and controlling that property must be deemed to be subject to the statutes which gave it its corporate life, and the authority to acquire the property and franchises of the Rochester City & Brighton Railroad Company. A different question would be presented if the Rochester City & Brighton Railroad Company were here claiming the right to immunity from taxation, and alleging that its contract rights were being impaired; but the Rochester City & Brighton Railroad Company has sold its franchises to the plaintiff in error, and the latter is now exercising and using its franchises and road, and the question is not whether the Rochester City & Brighton Railroad Company had a contract right of exemption from taxation for pavements, but whether if it ever had such immunity, that immunity passed to the plaintiff in error under the Statutes of the State of New York;

and thus the only question that arises is as to the proper construction of those statutes; whether they operated to transfer to the plaintiff all the immunities possessed by the Rochester City & Brighton Railroad Company.

The second assignment of error made by the plaintiff in error herein is as follows :

> "The Court erred in holding that even if such act in connection with such ordinances mentioned in the first assignment herein and its acceptance, and the action thereon by the Railroad Company, did constitute such contract, that portion thereof which exempted the Rochester City & Brighton Railroad Company from paying for new pavements, or any part thereof, in any streets mentioned and referred to in the complaint herein, was personal to such Railroad Company, *and did not pass to the plaintiff in error by virtue of the merger by the plaintiff in error of all the estate, property, rights, privileges and franchises of such Rochester City & Brighton Railroad Company, made under and by virtue of the provisions of Chapter* 254 *of the Laws of the State of New York of* 1867, *as amended by Chapter* 503 *of the Laws of the State of New York of* 1879. (Record, page 113.)"

The act under which the lease was made and the stock acquired by the plaintiff in error is conceded to be constitutional and valid, and the only question at issue is the effect which should be given to that act, and certainly the construction of that statute is one for the State Courts, and their decision thereon must be final.

Central Land Company vs. Laidley, 159 U. S., 103.

Webber vs. Rogan, 188 U. S., 10.

Tampa Water Works Company vs. Tampa, 199 U. S., 241.

Corkran Oil and Development Company vs. Arnaudet, 199 U. S., 182.

In *Central Land Company vs. Laidley,* 159 U. S., 103, the Court says :

> " The appellate jurisdiction of this Court, upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the Legislature alleged to be repugnant to the Constitution of the United States has been decided by the state court to be valid and not when an act admitted to be valid has been misconstrued by the Court. The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question; and it necessarily follows that the question submitted to and decided by the state court was one of construction only, and not of validity. If this Court were to assume jurisdiction of this case, the question submitted for its decision would be not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the state has erred in its construction of the statute. As was said by this Court, speaking by Mr. Justice Grier in such a case, as long ago as 1847, ' It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this Court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligations of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors com-

mitted by their judiciary. *Commercial Bank of Cincinnati vs. Buckingham,* 46 U. S., 5 How. 317, 343; *Lawler vs. Walker,* 55 U. S., 14 How., 149, 154."

It was held by the Court of Appeals in this case that the provision of the Railroad Law requiring street surface railroad companies to pay the cost of paving between their tracks and for two feet outside thereof, is an exercise of the taxing power. Citing *Sioux City Street Railway Company vs. Sioux City,* 138 U. S., 98; *Worcester vs. Worcester Street Railway Company,* 196 U. S., 539. (Record, page, 97.)

"A special statutory exemption or privilege such as an immunity from taxation or the right to fix and determine rates of fares does not accompany the property in its transfer to a purchaser in the absence of express direction to that effect in the statute."

St. Louis & San Francisco Railway Company vs. Gill, 156 U. S., 649.

The same rule is applicable when one corporation is owned and operated by another, pursuant to statutory authority.

People's Gas Light & Coke Company vs. Chicago, 194 U. S., 1.

The question as to whether such a statute operates to transfer the immunity to the purchasing or leasing corporation involves the construction of a State Statute, and raises no federal question.

Grand Rapids & Indiana Railroad Company vs. Osborn, 193 U. S., 17.

In that case it appeared that the plaintiff had acquired under mortgage foreclosure the railroad which it was operating. The statute under which the original railroad company was incorporated provided that railroad corporations might charge three cents per mile

for the transportation of passengers. The plaintiff after acquiring the railroad, became incorporated under a statute which provided that the commissioner of railroads might fix the rate for passenger transportation at a rate of two and one-half cents per mile, and the commissioner of railroads made an order requiring the plaintiff to charge not more than two and one-half cents a mile for the transportation of passengers.

The Court said :

> " That the section of the general railroad law of 1873 making provision for the creation of a new corporation upon the reorganization of a railroad by the purchaser at a foreclosure sale, did not constitute a contract protected by the Constitution of the United States, is concluded by the decision in *New York ex rel Schurz v. Cook*, 148 U. S., 397. In the course of the opinion of this Court it was said (p. 410): ' The plaintiffs in error acquired the properties and franchises of these corporations, which were subject to the taxing power of the state, after the act of 1886 was passed and went into effect. *There is no provision of the law under which they made their purchase requiring them to become incorporated, but desiring corporate capacity they demanded the grant of a new charter under which to exercise the franchises so acquired without compliance with the law of the state existing at the time their application for incorporation was made.* We are clearly of the opinion that the act of 1874, as amended in 1876, set up and relied upon by them, does not sustain such a claim. The provisions of that act do not constitute a contract on the part of the state with either the corporation or the mortgagees, bondholders, or purchasers at foreclosure sale. *They are merely matters of law instead of contract, and the right therein con-*

ferred upon purchasers of the corporate properties and franchises sold under foreclosure of mortgages thereon, to reorganize and become a new corporation, is subject to the laws of the state existing or in force at the time of such reorganization and the grant of a new charter of incorporation. Memphis & L. R. Co. vs. Railroad Commissioners, 112 U. S., 609.'

"It results from the foregoing that Sims, the purchaser of the railroad property in question at the sale under foreclosure, and his associates *could not demand to be incorporated under the statutes of Michigan as a matter of contract right. Possessing no such contract right, they or their privies cannot now be heard to assail the constitutionality of the conditions which were agreed to be performed when the grant by the state was made of the privilege to operate as a corporation the property in question. Having voluntarily accepted the privileges and benefits of the incorporation law of Michigan the company was bound by the provisions of existing laws regulating rates of fares upon railroads, and it is estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body. Daniels vs. Tearney,* 102 U. S., 415, and cases cited."

The decision of the State Court that the alleged immunity did not pass to the plaintiff in error is correct.

It is the established rule of this Court that it will agree with a State Court in its construction of a State Statute, whenever the question decided is balanced with doubt.

Mead vs. City of Portland, 200 U. S., 148.

Tampa Water Works Company vs. Tampa, 199 U. S., 241.

Chapter 503 of the Laws of 1879, under which the plaintiff in error acquired the property and franchises of the Rochester City and Brighton Railroad Company, provided that there should be transferred to it "all the estate, property, rights, privileges and franchises" of the former corporation.

At the time this act was passed, there were in force two other statutes, one providing for the formation of new companies to operate railroads sold under mortgage (Chapter 446 of the Laws of 1876) and another authorizing the consolidation of railroad companies (Chapter 917 of the Laws of 1869). The former provided that the purchasers of railroad properties sold under foreclosure might become a corporation "and shall have all the franchises, rights, powers, privileges and *immunities* which were possessed before such sale by the corporation whose property shall have been sold as aforesaid." The latter act provided that on the consolidation of the corporations, "all and singular the rights, privileges, *exemptions* and franchises of each of said corporations * * * shall be taken and deemed to be transferred to and vest in such new corporation."

Thus when the act was passed under which the plaintiff in error acquired the property of the former corporation, there were statutes in force which provided that on a foreclosure, the purchasers should take the *"immunities"* possessed by the corporation whose property was sold, and that on the consolidation of railroad companies, the new corporation should take the *"exemptions"* possessed by the consolidating companies. The omission of these words from the statute in relation to the rights acquired by the lessee must be deemed to show that the Legislature did not intend that the lessee could acquire any *exemptions or immunities*, and that, therefore, the statute did not operate to transfer to the plaintiff in error any exemption or immunity from taxation possessed by the Rochester City & Brighton Railroad Company.

This Court has decided absolutely that where one statute grants to a company all the rights, privileges and immunities of a former company, and a later statute grants to a corporation the rights and privileges of a former corporation omitting the word "immunities," this omission must be considered as showing the legislative intent that the later statute should not operate to pass any special exemption or immunity, such as an immunity from taxation.

Phoenix Fire & Marine Insurance Company vs. State of Tennessee, 161 U. S., 174.

In that case the Court said :

> " Is there any meaning to be attached to that omission, and if so why? We think some meaning is to be attached to it? The word "immunity" expresses more clearly and definitely an intention to include therein an exemption from taxation than either of the other words. Exemption from taxation is more accurately described as an " immunity " than as a privilege * * * In leaving out a word which, if used, would be regarded as specially and particularly including an exemption from taxation granted to another company, it seems to us that a very grave doubt is cast upon the title of plaintiff in error to the exemption claimed, and in such case the existence of a well founded doubt is equivalent to a denial of the claim."

It must be accepted as the settled doctrine of this Court at the present time that a grant to a corporation of the franchises, rights and privileges of a former corporation does not operate to transfer an immunity from taxation.

Gulf & Ship Island Railway Company vs. Hewes, 183 U. S., 66.

Phoenix Fire & Marine Insurance Company vs. State of Tennessee, 161 U. S., 174.

Wilmington & Weldon Railroad Company vs. Alsbrook, 146 U. S., 279.

Pickard vs. East Tennessee, Virginia & Georgia Railroad Company, 130 U. S., 637.

Chesapeake & Ohio Railroad Company vs. Miller, 114 U. S., 176.

In *Gulf & Ship Island Railway Company vs. Hewes* the Court says :

> " In addition to all this, however, the better opinion is that a suborgation to the 'rights and privileges' of a former corporation does not include an immunity from taxation."

In *Phoenix Fire & Marine Insurance Company vs. State of Tennessee*, it appeared that the Phoenix Fire & Marine Insurance Company by the act incorporating it, was granted all the *rights and privileges* of a former insurance company. The Court held that this did not operate to pass to it an exemption from taxation, and after reviewing all the cases, said :

> " If this were an original question, we should have no hesitation in holding that the plaintiff in error did not acquire the exemption from taxation claimed by it, and we think at the present time the weight of authority, as well as the better opinion, is in favor of the same conclusion which we should otherwise reach."

In *Wilmington & Weldon Railroad Company vs. Alsbrook*, it appeared that by its charter, the Wilmington & Raleigh Railroad Company was authorized to construct a railroad, and it was provided that its property should be exempt from taxation. Afterwards it

was authorized to construct branch roads, and it was declared that "*all the powers, rights and privileges*" conferred on the company in respect to the main road should extend to the said company in the laying out of the branch road. The Court held that this was not sufficient to extend immunity from taxation to the branch road.

In *Pickard vs. East Tennessee, Virginia & Georgia Railroad Company,* the question arose as to whether an immunity from taxation passed under the words "rights, powers and privileges." The Court in holding that it did not said :

> "It is true there are some cases where the term 'privileges' has been held to include immunity from taxation, but that has generally been where other provisions of the Act have given such meaning to it. The later, and we think the better opinion, is that unless other provisions remove all doubt of the intention of the Legislature to include the immunity in the term 'privileges' it will not be so construed. It can have its full force by confining it to other grants to the corporation.'

In *Chesapeake & Ohio Railway Company vs. Miller,* the question arises as to whether a company which had acquired on a mortgage foreclosure sale the franchises, rights and privileges of a former corporation, succeeded to an immunity from taxation. The Court says:

> "So far as material to the question, its language is : 'The corporation created by, or in consequence of, such sale and conveyance shall succeed to *all such franchises, rights and privileges,* and perform all such duties as would have been had, or should have been performed by the first company but for such sale and conveyance.' It is earnestly contended on behalf of the plaintiff in error that by virtue of this lan-

guage, it is entitled to enjoy the property formerly belonging to the Chesapeake & Ohio Railroad Company, its predecessor, precisely as though it had been incorporated under the charter of that company, and therefore with the exemption from taxation which was conceded to that company. But, broad, general and comprehensive as the language is, we cannot, in reference to the subject matter now in hand, apply it with that force and meaning. *The words used are, it will be observed, 'franchises, rights and privileges,'* * * * *'as would have been* had, * * * 'by the first company, but for such sale,' etc. *There is no express reference to a grant of any exemption or immunity; nothing is said in relation to the subject of taxation. The words actually used do not necessarily embrace a grant of such an exemption.* * * * The subject matter of this legislation was not the original construction of railroads, but the operation of railroads already constructed. The state was not in the attitude of a contractor, soliciting subscriptions of capital, in the formation of companies to undertake the risk of public improvements, for the benefit of the state, with the hazard of loss and perhaps financial ruin to the first promoters, and offering exemptions from taxation as a consideration, by way of contract, for the acceptance of its proposals. It was legislating in reference to enterprises already undertaken, prosecuted and completed by companies originally thus incorporated, and who, by reason of insolvency, had been stripped of their property by creditors and sentenced by the law to dissolution. * * * The contract of the creditors would be fully met, on failure of payment of the stipulated debt, by subjecting to sale the property pledged for its payment, with such rights, franchises

> and privileges only as were necessary for its beneficial use and enjoyment. The immunity from taxation, as we have already said, was not necessarily included in that designation. The debtor corporation, and its creditors combined, could not confer upon the purchasers any rights which were not assignable; and, as no consideration moved to the state for a renewal of the grant, there is no motive for finding by mere construction and implication, what the words of the law have failed to express. That certainly is not a reasonable interpretation for which no sufficient reason can be assigned."

The act under which the plaintiff in error is incorporated provides that it must pave between the tracks and two feet outside thereof of the railroad which it operates, and therefore must be held to prohibit the transfer to plaintiff in error of or exemption from such duty possessed by another corporation.

§ 1 of the act under which the plaintiff in error is incorporated provides :

> " Any number of persons not less than thirteen may make and sign articles of association and form a company for the purpose of constructing, maintaining and operating a street surface railroad for public use in the conveyance of persons and property, in cars, for compensation, in any of the cities, towns or villages of this state, or in any two or more civil divisions thereof. * * * *Such corporations shall* also have all the powers and privileges granted and *be subject to all the liabilities imposed by this act."*

§ 9 of said Act provides :

> " *Every such corporation incorporated under* or constructing, extending or operating a rail-

road constructed or extended under the provisions of this act within the incorporated cities and villages of this state, shall also whenever and as required, and under the supervision of the proper local authorities, have and keep in permanent repair the portion of any street and avenue between its tracks, the rails of its tracks and a space of two feet in width outside and adjoining the outside rails of its track or tracks, so long as it shall continue to use such tracks so constructed, under the provisions of this act."

§ 18 of said act provides :

"All acts and parts of acts, whether general or special, inconsistent with this act are hereby repealed."

Therefore plaintiff in error was incorporated under an act which provides that it shall be subject to all liabilities imposed thereby, one of which liabilities is that it shall pave between its tracks and two feet outside thereof. It acquired its corporate life under this act, and received the authority therefrom to lease the property and franchises of the Rochester City & Brighton Railroad Company, and must be deemed to have accepted its corporate capacity and to have leased the property and franchises of the Rochester City & Brighton Railroad Company subject to the provisions and liabilities of the act under which it was incorporated.

If the act of 1884, under which plaintiff in error was incorporated, and Chapter 503 of the Laws of 1879, permitting railroad corporations holding a lease of another railroads to acquire the stock, property and franchises of the latter, be read together, it will result in the conclusion that the later act modified the former so as to forbid a corporation formed under the Laws of 1884 to acquire by lease or purchase any immunity

from paying the cost of paving between the tracks and two feet outside of the tracks of the railroad operated by it.

It is well settled that a corporation is bound by the provisions of the act under which it is incorporated, and that when it has taken advantage of the provisions of a statute granting it corporate capacity, it assumes all liabilities arising therefrom.

Grand Rapids & Indiana Railway Company vs. Osborn, 193 U. S. 17.

II.

The Right of Plaintiff in Error to Acquire and Hold the Alleged Immunity from Taxation is Subject to the Reserved Power of Alteration, Amendment or Repeal.

Counsel for plaintiff in error in his brief seems to take it for granted that the plaintiff in error occupies the same position in this case as would the Rochester City & Brighton Railroad Company if it were the plaintiff in error. But in this he is mistaken, for all the property, rights, privileges and franchises of the Rochester City & Brighton Railroad Company are now vested in the plaintiff in error who has acquired such property and franchises "*pursuant to the provisions of the Statutes of the State of New York in such case made and provided.*" The plaintiff in error is a distinct corporation organized about twenty-one years later than the Rochester City & Brighton Railroad Company and under a different act of the Legislature; and in order for it to hold the rights and immunities which it now claims it must show some title thereto, and it seeks to do this by virtue of the provisions of certain Statutes of the State of New York.

The act under which the plaintiff in error was incorporated provided that it should be subject to all the liabilities imposed by that act (§ 1); that it should pave between the tracks, the rails of the tracks and two feet outside thereof of the railroad operated by it (§ 9); that it should have the power to lease the road of another railroad company (§ 15). Section 19 thereof reads as follows :

"The Legislature may at any time alter, amend or repeal this Act." This was in accordance with the Constitution and other statutes in force at that time. The Constitution provided :

> "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where in the judgment of the Legislature the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed." (Constitution, Art. 8, § 1.)

The Revised Statutes (Title 3, Chap. 18, § 8) provides that "the charter of every corporation which shall hereafter be granted by the Legislature, shall be subject to alteration, suspension or repeal in the discretion of the Legislature."

The Legislature pursuant to its reserved power did alter the act under which the plaintiff in error was incorporated, and the provisions of Chapter 252 of the Laws of 1884 were incorporated in the Railroad Law (Chap. 565 of Laws 1890), and Chapter 252 of the Laws of 1884 was specifically repealed; and the provisions of Chapter 254 of the Laws of 1867 relating to railroads held under lease were incorporated in the Railroad Law of 1890, and that Chapter was specifically repealed by the latter law. The Legislature thus in the Laws of 1890, the Railroad Law of the State of New York, incorporated all the provisions of the statutes relating to railroads which it deemed proper to keep in force, and if the plaintiff in error, under Chapter 252 of the Laws of 1884, could acquire and hold the alleged immunity from taxation, it took it under a charter and a law which was subject to alteration, amendment or repeal; and the Legislature has seen fit to repeal the very law under which the plaintiff in error was incorporated, and to re-enact in its place a similar law but with somewhat different provisions as to the duties of corporations with respect to the paving of streets, and under this act the plaintiff in error is charged with the duty of paying the cost of paving cer-

tain portions of the street through which it operates its railroad, and certainly the Legislature under its reserved power had the right to enact this law.

Thus even if the plaintiff in error did acquire from the Rochester City & Brighton Railroad Company the alleged immunity from paying for pavements, it received it subject to the reserved power of the Legislature to alter or amend that right; to take it away; and to add new burdens to the franchise granted to the plaintiff in error.

> *Maine Central Railroad Company vs. State of Maine*, 96 U. S., 499.
>
> *The People of the State of New York vs. Cook*, 148 U. S., 397.
>
> *Stanislaus County vs. San Joaquin & K. R. C. & I. Co.*, 192 U. S., 201.

The case of *Maine Central Railroad Company vs. State of Maine* must be decisive of the case at bar, for in that case it appeared that in the charter of two railroad companies there was a clear conditional limitation upon the power of the State to tax them. The two companies were consolidated and merged into a new company which was formed and succeeded to the powers, privileges and immunities of the former corporations. At the time of the formation of the new company there was a general law which declared that any act of incorporation subsequently passed should at all times thereafter be liable to be amended, altered or repealed at the pleasure of the Legislature.

The Court said :

> "The Maine Central Railroad Company was, upon the consolidation of the original companies, a new corporation, as distinct from them as though it had been created before their existence. The fact that the powers, privileges

and immunities which they had possessed were conferred upon the new company, so far as they could be exercised and enjoyed by it, in no respect affected its character as a distinct body. * * * When this new company came into existence, it became subject to the provisions of the General Law of 1831, which declared that any act of incorporation subsequently passed should at all times thereafter 'be liable to be amended, altered or repealed at the pleasure of the Legislature in the same manner as if an express provision to that effect were therein contained, unless there shall have been inserted in such act of incorporation an express limitation or provision to the contrary.' * *

* There was no limitation in the act authorizing the consolidation, which was the act of incorporation of the new company, upon the legislative power of amendment and alteration, and of course there was none upon the extent or mode of taxation which might be subsequently adopted.

"By the reservation in the Law of 1831, which is to be considered as if embodied in that Act, the State retained the power to alter it in all particulars constituting the grant to the new company formed under it, of corporate rights, privileges and immunities. The existence of the corporation and its franchises and immunities derived directly from the State were thus kept in control."

In the case of *People of the State of New York vs. Cook,* the power of reservation contained in the Constitution and Statutes of the State of New York was under consideration. In that case it appeared that the plaintiffs in error had acquired the property and franchises of an existing railroad upon a mortgage foreclosure sale, and had applied for incorporation and were

refused unless they paid an incorporation tax. They claimed that by the statute under which the mortgage, was made and the sale was held, they had a contract right to succeed to the properties of the defunct corporation, and to become a corporation without the payment of any tax.

The Court said :

> " There is another difficulty in the way of sustaining the claim of the plaintiffs in error in this case. The Constitution of New York providing for the formation of corporations under general laws, reserves to the State the power to alter, change or repeal all such general laws.
>
> " The Revised Statutes of the State (8th ed. vol. 3, chap. 18, title 3, p. 1724, § 8) provides that ' the charter of every corporation that shall be granted by the Legislature shall be subject to alteration, suspension or repeal in the discretion of the Legislature;' and by the General Railroad Law of New York (Laws of 1850, chap. 140, § 48) it is provided that ' the Legislature may, at any time, annul or dissolve any corporation formed under this act, but such dissolution shall not take away or impair any remedy given against such corporation, its stockholders or officers for any liability which shall have been previously incurred.'
>
> " In the case of *People vs. O'Brien,* 111 N. Y., 1, cited by counsel for the plaintiffs in error, while the Court held that it was not within the power of the Legislature to destroy the property rights of a corporation, it was not questioned that the Legislature could destroy the existence of the corporation.
>
> " In the still later case of *New York vs. Twenty-third Street R. Co.,* 113 N. Y., 311, it

was directly held that the right reserved to the Legislature to alter or repeal the charter of a corporation included the right to tax a corporation upon its franchises as such instead of exacting license fees as before prescribed. Earl, J., speaking for the Court there said : 'As it (the Legislature) has the power utterly to deprive the corporation of its franchise to be a corporation, it may prescribe the conditions and terms upon which it may live and exercise such franchises. It may enlarge or limit its powers, and it may increase or limit its burdens.' This construction of the statutes of the state by its highest court is of controlling authority. *Bucher vs. Cheshire R. Co.*, 125 U. S., 555 (31:795); *Gormley v. Clark*, 134 U. S., 338 (33:909), and *Stutsman County v. Wallace*, 142 U. S., 293 (35:1018). The right being thus reserved to the Legislature, under the power to alter or repeal the charter of corporations, not only to terminate their existence, but to impose upon them increased burdens, it cannot be properly asserted that the act of 1886, imposing the tax complained of, was unconstitutional, even though the act of 1874 created a contract with corporations and their mortgagees to whose right, properties and franchises plaintiffs in error have succeeded. The corporations, mortgagees and bondholders under such circumstances acquire their rights subject to the reserved power of the Legislature to enlarge or diminish the franchises conferred, and to increase or reduce the burdens thereon. Purchasers succeeding to properties and franchises of corporations thus situated cannot occupy any better position in respect to their application for a new charter of incorporation.

> "In *Hamilton Gas-light & C. Co. v. Hamilton City*, 146 U. S., 258, 270, it was said by this Court that 'a legislative grant to a corporation of special privileges, if not forbidden by the Constitution, may be a contract; but where one of the conditions of the grant is that the Legislature may alter or revoke it, a law altering or revoking, of which has the effect to alter or revoke, the exclusive character of such privileges, cannot be regarded as one impairing the obligation of the contract. * * * The corporation, by accepting the grant subject to the legislative power so reserved by the Constitution, must be held to have assented to such reservation,' citing, in support of those views, *Greenwood v. Union Freight R. Co.*, 105 U. S., 13, 17. This principle should be especially maintained and applied in cases like the present where the taxing power of the state is involved."

In *Stanislaus County vs. San Joaquin & K. R. C. & I. Company*, 192 U. S., 201, the Court in holding that the rates chargeable by the Water Company fixed in its charter were subject to alteration or repeal under a constitutional provision worded exactly the same as the similar provision of the New York Constitution, said :

> "Assuming there was a contract, we think the rates could be changed under that provision of the Constitution of the State, adopted in 1849, Article Four, § 31, which provided: 'Corporations may be formed under general laws but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.' This Court has had frequent occasion to discuss the

> meaning and extent of the power thus reserved as it exists in about all the states either by constitutional or statutory provisions."

And after reviewing numerous cases upon this point, the Court further said :

> "We are quite clear that, even assuming there was a contract, the Legislature, nevertheless, had the power to so alter and amend the act of 1862, as to provide for the fixing of rates as set forth in the act of 1885."

Under these decisions it must be clear that the plaintiff in error acquired its charter and acquired the right to lease the property and franchises of the Rochester City & Brighton Railroad Company under a law which was subject to alteration, amendment or repeal, and that under this reserved power the Legislature had the right to take from it any special immunities or privileges which it possessed and to impose upon it such additional burdens as it deemed desirable.

III.

The Act of 1869 Was Passed to Grant Relief to the Rochester City & Brighton Railroad Company, Was Based Upon No Consideration, and Was a Gratuity Repealable at Pleasure.

The original Rochester City & Brighton Railroad Company was incorporated on the 31st day of May, 1862, pursuant to the provisions of Chapter 140 of the Laws of 1850. (Record, page 30.)

This railroad corporation applied to the Common Council of the City of Rochester for permission to construct a street railroad in the City of Rochester, as the act under which it was incorporated provided that it could not be constructed "in, upon or across any streets in any city without the assent of the corporation of such city." (§ 28, subd. 5.) The Common Council on the 24th day of June, 1862, passed an ordinance granting to said corporation the right to construct a railroad, "upon the terms, conditions and stipulations hereinafter prescribed," and among the prescribed conditions were the following :

> "Said company shall, under the terms of and as required by the Common Council of the City of Rochester, improve with suitable material, as such Common Council shall direct and in a proper manner, between its tracks, the rails of its tracks and for two feet and four inches outside thereof. * * *
>
> "The said Railroad Company may charge and collect from every person on entering any of their cars or carriages for riding any distance upon said road on the same continuous route, a sum not exceeding five cents, except children under five years of age accompanied by parents

or other persons having them in charge, such children to ride free. * * *

"It is hereby reserved to the Common Council of the City of Rochester the right to make such further orders, rules and regulations in relation to the construction, repairs and operation of said railroad as from time to time may be deemed necessary to protect the interests of said city and the safety, welfare or accommodation of the public." (Record, pages 31, 32.)

Said ordinance further provided that the grant should be formally accepted by the Railroad Company within sixty days from the date of the passage of the resolution.

On the 8th day of July, 1862, the Rochester City & Brighton Railroad Company "*duly accepted the grant subject to the provisions and restrictions therein contained,* and such acceptance was duly approved by the City Attorney of the City of Rochester." (Record, page 33.)

This ordinance with the provisions and conditions thereunto annexed, upon its acceptance by the Rochester City & Brighton Railroad Company, became a contract between the city and said Railroad Company, and this has been distinctly held by the Court of Appeals of the State of New York.

In *Mayor, etc., of City of Troy vs. The Troy & Lansingburgh Railroad Company,* 49 N. Y., 657, it appeared that a railroad incorporated under the same act as the Rochester City & Brighton Railroad Company, was granted leave to construct a road through certain streets in Troy by an ordinance passed in August, 1860, in which ordinance certain conditions were imposed, among which was that the company should keep in repair the pavement between the tracks and for a distance of eighteen inches outside of each track, and to cause

the snow and ice to be removed therefrom so as to afford a safe and unobstructed passage to sleighs and wagons.

It appeared that the Railroad Company let snow and ice accumulate between its tracks and made dangerous excavations by digging through the ice and snow and rendered the street unsafe, in consequence of which a person passing in a sleigh was thrown out and injured. The injured person subsequently recovered damages against the city, and thereupon the city sought to recover the amount of the judgment from the Railroad Company. The headnote of the case in the Court of Appeals is as follows :

> " By the acceptance by a railroad corporation of a license from a municipal corporation to lay and operate its tracks in the streets of the latter, the terms and conditions upon which the license is granted become a contract between the parties."

The Court of Appeals has held that the conditions which may be imposed by a municipal corporation are such only as relate to matters over which the Legislature has not retained control.

> *Matter of Kings County Elevated Railroad Company*, 105 N. Y., 97, 114.

In that case the Court said :

> " However it may be with this condition, the others are neither reasonable nor lawful. They relate to matters over which the Legislature and the Commissioners have entire control. The Statute determines how the damages of the land owner shall be ascertained and confers upon the Commissioners sole power and jurisdiction to determine when the various portions of the road shall be completed. Their action is as the action of the Legislature, and can neither

be superseded nor in any way affected by that of any other body; but here the resolution of the Common Council is wholly repugnant to the Statute in one case and to the condition imposed by the Commissioners in the other."

The case of *Potter vs. Collis*, 156 N. Y., 16, cited by counsel for the plaintiff in error, does not decide anything to the contrary and no question was raised in that case as to whether the Common Council when it could lawfully grant permission to construct a street railroad had the right to annex conditions thereto. The only question was as to whether the grant of such a right to individuals was lawful.

The Court in that case, at page 30, says :

"What the Common Council or the corporation had attempted to grant to Pettigrew and his associates was a right to an exclusive interest in the streets, and that was beyond the power of either. It could not be sustained under any theory, either of a franchise or of a license. The Common Council could not divest the municipal corporation of that control over the streets, which was held by it in trust for the public. All that the municipal corporation could do within the provisions of the General Railroad Act of 1850, was to assent to the construction of a railroad. * * * It undertook to grant a right which, if effective, operated to invest private parties with an exclusive interest in its streets. * *

"The Common Council then, being without power to confer any such right under its resolution, the consideration for the contract subsequently executed failed, and it was of no force or effect."

Therefore the franchise of the original Rochester City & Brighton Railroad Company required it to pave

between its tracks for two feet and four inches outside thereof.

Thereafter the property, rights, privileges, franchises and interests of the original Rochester City & Brighton Railroad Company were sold on mortgage foreclosure sale to Chauncey B. Woodworth, who associated with himself other persons, and on the 5th day of March, 1868, filed articles of association incorporating the new Rochester City & Brighton Railroad Company. (Record, pages 33, 34.) The new company thereupon *petitioned* the Common Council of the City of Rochester "*protesting against the onerous conditions of § 2 of the said resolution of* 1862." (Record, page 34.)

"Thereafter and for a space of upwards of a year, the question was debated in the Common Council, committees appointed, and various hearings had," and on the 12th day of January, 1869, the ordinance of 1862 was amended so as to contain the following provision :

> "Whenever it becomes necessary to improve by ordinance or otherwise, any of the streets through which their track is laid, with a new or permanent improvement, said Company shall not be required to make any part or portion thereof, nor bear any part or portion of the expense of making the same *during the term of five years from the adoption of this ordinance.*
> * * *
>
> "Said company may charge and collect from every person on entering any of their cars or carriages, for riding any distance upon said road, to or from the extremities at either railway depot, a sum not exceeding five cents, except children under five years of age, accompanied by parents or other persons having them in charge. Such children to ride free and except also that said company shall not charge nor re-

> ceive from children under twelve years of age, more than three cents for any of above distances." (Record, pages 34 & 35.)

Shortly after the amendment of the ordinance, *an act was drawn by the Rochester City & Brighton Railroad Company* which was transmitted to the Common Council of the City of Rochester by the Mayor thereof, with a written request that a resolution be passed approving the act and requesting its passage by the Legislature. Thereupon the Common Council passed the following resolution :

> "Resolved, That the Clerk of this Board be authorized to transmit a copy of the bill relating to street railroads presented by the Mayor to this Board to the Legislature *requesting that body to legalize the action of the Common Council by the passage of said act.*"

On the 12th day of February, 1869, said act was passed by the Legislature of the State of New York and signed by the Governor of the State. (Record, page 35.)

It thus appears that after the property and franchises of the old Rochester City & Brighton Railroad Company had been sold, the purchasers thereof became incorporated on the 5th day of March, 1868. The amendment to the ordinance was passed on the 12th day of January, 1869, and the act of the Legislature under which the immunity is claimed herein, was adopted on the 12th day of February, 1869, thus showing that the new company was in possession of and operating a railroad in the City of Rochester for upwards of a year before the act relied upon was passed.

Chapter 34 of the Laws of 1869 reads as follows :

> "§ 1. **The Rochester City & Brighton Railroad Company is hereby authorized and empowered to maintain and operate a railroad in**

all of the streets of the City of Rochester in which it has a track now laid, and with the permission of the Common Council of said city in such other streets in said city as it shall elect to use for that purpose; and with the consent of said Common Council to lay a double track in any such street or streets, and the said company shall not be bound or required to construct and operate a railroad in any street of said city where there is now no track.

"§ 2. Said company, by and with the consent of the Common Council of said city, may at any time hereafter abandon the use of any street now used or which may hereafter be used, by it for the operation of its road, and upon such abandonment shall take up its track and restore such street to as good condition as it was before the removal of such track."

§ 3 provides a mode for acquiring real estate by condemnation.

§ 4 provides that "said company may and is hereby authorized to charge, collect and receive from each and every passenger for riding any distance upon its said road towards or from the intersection of Buffalo Street with Main and Exchange Street in said city, the sum of five cents, except that children under twelve years of age shall only be required to pay three cents fare, and children under five years of age accompanied by parents or other persons having them in charge, shall ride free."

§ 5 provides that "said company shall put, keep and maintain the surface of the streets inside the rails of its track in good and thorough repair, under the direction of the committee on streets and bridges of the Common Council of said City of Rochester; but whenever any of said streets are by ordinance or otherwise permanently improved, said company shall not be required

to make any part or portion of such improvement, or bear any part of the expense thereof, but it shall make its rails in such street or streets conform to the grade thereof."

§ 6 provides that "this act shall not be construed as in any way impairing the force or effect of the resolution or ordinance of the Common Council of the City of Rochester, entitled 'An ordinance in relation to street railroads' passed June 24th, 1862, and the amendments thereof, except as is herein specifically provided." (Record, pages 17, 18).

This act is entitled "An act for the relief of the Rochester City & Brighton Railroad Company" (Record, page 17), and all its provisions show that it was not adopted for the purpose of imposing any additional burdens on the railroad, but to relieve it from the burdens imposed upon it by its franchise.

The first section of the act provides that the company may maintain its railroad in the streets in which its tracks are now laid, and shall not be bound to construct a railroad in any street where there is no track. This provision was inserted in the Relief Act merely to prevent forfeiture which the Statute of 1850 provided might be enforced if the railroad were not completed within five years from the time of incorporation (Laws 1850, Ch. 140, § 47), and, of course, this was not the grant of a new franchise, but was merely to prevent a forfeiture of the old one. Consequently, the Court of Appeals was entirely justified in holding as it did that the Act of 1869 was not the grant of a new franchise. (Record, page 99).

Section one of the act in addition provides that the railroad may extend its tracks in other streets with the consent of the Common Council, and this was merely the regulation of an existing right. The articles of incorporation of the Rochester City & Brighton Railroad Company provided that it was for the purpose of ope-

rating a railroad in the City of Rochester heretofore constructed, maintained and operated by the Rochester City & Brighton Railroad Company wherein said railroad is now laid and run "*and in and through such other streets as the public interests may hereafter require.*" (Record, page 34).

Section 23 of the act under which the company was incorporated (Ch. 140, L. 1850) provides that the directors may by a vote of two-thirds of their number at any time alter or change the route or any part of the route of their road, "and no such alteration shall be made in any city or village after the road shall have been constructed, unless the same is sanctioned by a vote of two-thirds of the Common Council of said city or trustees of said village." The Relief Act provided that extensions might be made with the consent of the Common Council, which, of course, had the effect of requiring a majority vote instead of a two-thirds vote of the Common Council in order for the company to obtain the right to extend its road through any other street or streets in the City of Rochester; and certainly this was a mere regulation of existing right enjoyed by the company.

Section two of the act provides for the abandonment of the railroad in any street with the consent of the Common Council, which, of course, imposed no burden upon the Railroad Company.

Section three merely enlarged the powers of condemnation of the Railroad Company.

Section four prescribed the same rate of fare as the Common Council under its reserved power had prescribed in the amendatory ordinance, and this certainly was no additional burden on the Rochester City & Brighton Railroad Company, as the Legislature in the act under which it was formed had reserved the power to alter the rates of fare, the provision being "The

Legislature may when any such railroad shall be open for use, from time to time, alter or reduce the rate of freight, fare or other profits upon such road." (Laws 1850, Ch. 140, § 33.)

The provisions as to repairs and repavements certainly lightened the burdens imposed upon the Railroad Company in the ordinance of the Common Council granting the franchise.

It was conceded and found herein that after the passage of the Act of 1869 "the said Rochester City & Brighton Railroad Company continued to maintain and operate its street surface railroad under the general statutes of the State of New York." (Record, pages 35 & 36.) This concession is important as showing that the Act of 1869 was not the grant of a new franchise and did not grant new powers for the operation and extension of the railroad, but merely regulated the powers possessed by the Rochester City & Brighton Railroad Company under its charter.

An analysis of this Act thus clearly shows that it did not confer upon the Rochester City & Brighton Railroad Company any new franchises, and did not impose upon it any additional burdens, but that it was passed for the purpose, as its title shows, of relieving said Railroad Company from existing burdens and that in fact is the only effect which can be given to the act.

The Railroad Company was relieved from the danger of forfeiture of its franchises; it was permitted to extend its tracks with the consent of a majority of the Common Council instead of two-thirds thereof. Its mode of condemning lands was made less difficult. It was exempted from paying for pavements, and the rates of fare were fixed as prescribed in the amendatory ordinance of the Common Council and added no burden which the Legislature did not have the right to impose, as it had reserved to itself the power to regulate the rates of fare.

It will be observed that at the time the act of 1869 was passed a street railroad had been constructed in the City of Rochester and was in operation. That the Rochester City & Brighton Railroad Company was then the owner of said railroad and operating it, and so, of course, said act was not passed for the purpose of inducing people to invest their money in the construction of a railroad for the benefit of the public. The money had been invested and the road had been constructed and was in operation, and the State as a mere bounty to the Rochester City & Brighton Railroad Company passed the act in question. When that act was passed no new duties were imposed upon the railroad company, and nothing was promised or pledged by it. All that the act accomplished was to relieve the Railroad Company from certain burdens and thus the act was a mere gratuity and repealable at any time.

Grand Lodge vs. City of New Orleans,
166 U. S., 143.

In that case the Court said :

> " The only question in this case is whether the act of 1855, exempting the hall of the Grand Lodge from state and parish taxation, ' so long as it is occupied as a Grand Lodge of the F. & A. Masons,' constitutes a contract between the State and the complainant, or was a mere continuing gratuity which the Legislature was at liberty to terminate or withdraw at any time, and which the state did subsequently withdraw by the adoption of a Constitution, which secured the exemption of the property of 'all charitable institutions; * * * provided, the property so exempted be not used or leased for the purposes of private or corporate profit or income.' It appeared in this case that, during the years in which the assessments complained of were made, a part of the ground floor of the exempted prop-

erty was rented for stores; that some of the rooms were rented for other like purposes, and that from these sources a large amount of corporate income had been realized, although that income was devoted to charitable purposes.

"If the act of 1855 be regarded as a contract within the case of *Dartmouth College v. Woodward,* 17 U. S., 4 Wheat., 518, then it is clear that the exemption from taxation was valid, and beyond the power of the Legislature to abrogate.

> *Piqua Branch of State Bank v. Knoop,* 57 U. S., 16 How., 369; *New Jersey vs. Wilson,* 11 U. S., 7 Cranch., 164; *Gordon vs. Appeal Tax Court,* 44 U. S., 3, How., 133; *Dodge vs. Wolsey,* 59 U. S., 18 How., 331; *Jefferson Branch Bank vs. Skelly,* 66 U. S., 1 Black, 436; *McGehee vs. Mathias,* 71 U. S., 4 Wall., 143; *Wilmington & W. R. Co. vs. Reid,* 80 U. S., 13 Wall., 264; *Humphrey vs. Peques,* 83 U. S., 16 Wall., 244; *Farrington vs. Tennessee,* 95 U. S., 679; *New Jersey vs. Yard,* 95 U. S., 104.

"To make such a contract, however, there is the same necessity for a consideration that there would be if it were a contract between private parties. If the law be a mere offer of a bounty, it may be withdrawn at any time, notwithstanding the recipients of such bounty may have incurred expense upon the faith of such offer. Thus the Legislature of the State of Michigan, desiring to encourage the manufacture of salt, which had been recently discovered in the Saginaw Valley in 1859, offered exemption from taxation and a bounty of 10 cents per bushel to all individuals, companies, or corporations

formed for the purpose of boring for and manufacturing salt. It was held in *Salt Mfg. Co. v. East Saginaw,* 80 U. S., 13 Wall, 373, that, if the salt company plaintiff had been incorporated by a special charter, containing the provision that its property should be exempt from taxation, and that charter had been accepted and acted upon, it would have constituted a contract; but that this was a bounty offered to all corporations and individuals who should manufacture salt, and there was no pledge that it should not be repealed at any time; that as long as it remained a law, every individual or corporation was at liberty to avail himself or itself of its advantages, by complying with its terms and doing the things which it promised to reward; but was also at liberty at any time to abandon such a course; that it was a matter purely voluntary upon both sides—giving to one party the power to abandon the manufacture of salt, and to the other to repeal the exemption from taxation and the bounty of 10 cents per bushel. The consequence of a different decision in this case might easily have become disastrous, since the arguments which were urged upon this Court at that time would have been equally forceful at any time thereafter, and the state might have found itself bound by a perpetual pledge to pay 10 cents upon every bushel of [illegible] thereafter manufactured by the companies, which had embarked in the enterprise under the encouragement of the bounty. A like ruling was made in *Welch v. Cook,* 97 U. S., 541, in which an act of the Legislature of the District of Columbia, exempting from general taxation for ten years such real and personal property as might be employed within the District for manufacturing purposes, did not create an irrepealable contract

with the owners of such property, but merely conferred a bounty, liable at any time to be withdrawn.

"Complainant, while admitting the soundness of this proposition, claims that the requisite consideration existed in the deed by which the property was acquired, wherein the Grand Lodge solemnly declared and proclaimed said purchase to be made for the purpose and object of creating a fund for charitable purposes, in the relief of worthy distressed members of the order, their wives, children and families; and solemnly pledged itself that as soon as the said property should be paid for, the whole of the revenue which might be derived from it, after deducting necessary and unavoidable expenses on its account, should be devoted to those objects.

"This consideration, however, was not one upon the faith of which the Legislature granted the exemption, since the deed had already been in existence for two years, and the property had been purchased under the resolution of the lodge, adopted January 27, 1853, to the same effect as the above recital in the deed. While subscriptions for the purchase of the property may have been obtained upon the faith of this resolution, it cannot be said to have constituted a consideration for the exemption. The alleged contract for exemption was not contained in the charter—as in other cases where such exemption has been sustained—since the lodge had already pledged its revenues to charitable purposes; and when the act was passed it gave no additional pledge, and promised nothing which it had not already promised and was bound in honor to perform. If additional subscriptions were obtained upon the faith of the act, the subscribers were bound to take notice of the fact that the

Legislature was at liberty to repeal the act at any time, or, that the people might, in the exercise of their sovereign power, nullify it by an amendment to the constitution.

"In *Home for the Friendless v. Rouse*, 75 U. S., 8 Wall, 430, relied upon by the plaintiff in error the exemption was contained in the original charter of the Home for the Friendless, which purported in its preamble to be granted for the purposes of encouraging the undertaking, and enabling the parties engaged therein more fully and effectually to accomplish their laudable purpose. The exemption was offered, not in view of a consideration which had already passed, but for the purpose of inducing the incorporators to accept the charter and to carry out the enterprise.

"So, in *St. Anna's Asylum v. New Orleans*, 105 U. S., 362, the institution was incorporated under an act of the General Assembly, which declared that all the property belonging to the institution should be exempted from all taxation. The question turned upon the exemption of certain property which was devised to it twenty years after it was incorporated, the revenues of which were applied to enable it to carry on its work; but it was held that the contract applied not only to property in existence when the charter was granted, nor only to that which was in existence when the Constitution of 1868 was adopted, but to all which might afterward be acquired in the due fulfillment of the purposes of the institution.

"We are of opinion that the act in question in this case was one which the Legislature might properly enact as a matter of public policy, and in aid of a beneficent purpose; but that it was a

mere gratuity or bounty which it was competent at any time to terminate, and that this was done by Const. 1879, Art. 207. The case is practically upon all fours with that of *Christ Church vs. Philadelphia County,* 65 U. S., 24 How., 300, in which the Legislature of Pennsylvania enacted, that 'the real property, including ground rents, now belonging and payable to Christ Church Hospital, in the City of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes.' Eighteen years thereafter the Legislature enacted that all property belonging to any association, then exempt from taxation, other than that in actual use and occupation of such association, should thereafter be subject to taxation. It was held that this last law was not in violation of the Constitution of the United States; that the former act of 1833 was a mere privilege existing *bene placitum,* and might be revoked at the pleasure of the sovereign. It would seem from this case that the hospital had been incorporated long before the act containing the exemption was passed, as that act recited that the hospital 'had for many years afforded an asylum for numerous poor and distressed widows,' and that the exemption was granted on account of its means being curtailed by decay of the buildings, and the increased burden of taxation. So in *Tucker v. Ferguson,* 89 U. S., 22 Wall., 527. And in *West Winconsin R. Co. v. Trempealeau County Supers.,* 93 U. S., 595, it was held that an act of the Legislature exempting property of all railroads from taxation was not a contract to exempt unless there were a consideration for the act; that the promise of a gratuity, spontaneously made, may be kept, changed, or recalled at pleasure, and that this rule applied to the agreements of states, made

without consideration, as well as to those of persons. See also *Newton v. Mahoning County Comrs.*, 100 U. S., 548, 561, and *People, Cunningham vs. Roper*, 35 N. Y., 629, wherein a law, providing that persons who had served seven years in the militia and had been honorably discharged, were entitled to perpetual immunity from taxation to the extent of five hundred dollars each, was held to be repealable at any time by the Legislature.

> "The act of 1855, now in question, clearly falls within the latter class of gratuities or bounties, which are subject to the will of the Legislature, and may be withdrawn at any time."

In *Stanislaus County vs. San Joaquin & K's R. C. & I. Co.*, 192 U. S., 201, it appeared that an irrigation company was incorporated under statutes granting it power to furnish water and to collect water rents, which should be subject to regulation by the Board of Supervisors, but which should not be reduced so low as to yield less than one and one-half per cent. per month upon the capital invested. After the company had been formed and had been in actual operation for a number of years, the Legislature passed another act providing that the supervisors might fix the water rates so that the annual receipts of the corporation should not be less than six nor more than eighteen per cent. upon the value of all the property of the corporation actually used in its business.

This Court held that as the first act did not contain a provision guaranteeing to the corporation that its rates would never be altered, the Legislature retained the right to thereafter reduce the amounts which the water company should receive, and said :

> "It seems to us that language of this nature cannot properly be construed as a promise or

pledge that the limitation as to rates may not be altered at any time when, in the judgment of the Legislature, it may be proper so to do. * * * It would be most unreasonable to suppose that it was intended by any such legislation to forever thereafter tie the hands of the state in regard to all companies organized under the Act of 1862, and before the passage of the Act of 1885. The authority given by the Act of 1862 enabled the Board of Supervisors to conditionally regulate the rates. There is no promise made in the act that the Legislature would not itself subsequently alter that authority. The state simply authorized its agents, the Boards of Supervisors, to regulate rates, but not to reduce them below a certain point. We do not think that from this language a contract can or ought to be implied that the state might not thereafter authorize the boards to reduce them, or that it might not itself do so directly. * * * In our belief the language of the Act of 1862 does not and was not intended to form a contract, but simply amounted to the statement of the then pleasure of the Legislature, to so remain until subsequently altered by it."

Then after reviewing at great length numerous authorities, the Court further says :

"Sufficient cases have been cited to show that language quite as strong as that used in the Act of 1862 does not amount to a contract. It is true that the cases cited involved questions of alleged contracts for exemption from taxation, in regard to which it has been said that no presumption exists in favor of a contract by a state to exempt lands from taxation, and that every reasonable doubt should be resolved against it. * * * To regulate or establish rates for which water will be supplied is in its nature the execu-

tion of one of the powers of the state and the right of the state so to do should not be regarded as parted with any sooner than the right of taxation should be so regarded, and the language of the alleged contract should in both cases be equally plain."

The ordinance adopted by the Common Council in 1869 amending the ordinance of 1862, *limited the immunity* from paying the cost of pavements granted to the Company *to the term of five years,* and the resolution passed by the Common Council requesting the Legislature to pass the Act of 1869, expressly recited that the Legislature was requested to pass the act "to legalize the action of the Common Council."

This shows clearly that the City of Rochester never consented to permanently exempt the Rochester City & Brighton Railroad Company from paying a share of paving streets in which it was operating its railroad.

The Act of 1869 did not place any limitation of time upon the immunity granted to the Rochester City & Brighton Railroad Company but it *did provide that that act should not be construed as impairing the force or effect of the ordinance of the Common Council entitled "An ordinance in relation to street railroads" passed June* 24, 1862, *and the amendments thereof,* except as it is herein specifically provided; and thus the act of 1869 must be construed as having read into it the ordinance of 1862 and the amendment adopted in 1869, and *with these ordinances read into it, the exemption from paying a share of the cost of pavements granted to the Railroad Company by the Act of* 1869 *is limited to the term of five years.* Certainly this act does not clearly express an intention to forever exempt the Railroad Company from paying a certain share of the cost of pavements; and the act granting this exemption must be construed strictly against the grantee and in favor of the public, and whatever is not specifically granted in that act must be deemed to be withheld; and if the words of

the act leave it doubtful as to whether it intended to grant permanent exemption, this doubt must be held to be equivalent to a denial of a permanent exemption.

Knoxville Water Company vs. Knoxville, 200 U. S., 22.

People of State of N. Y. ex rel Met. St. Ry. Co. vs. Tax Com'rs, 199 U. S., 1.

It was conceded and expressly found herein that the Act of 1869 "*was drawn by the Rochester City & Brighton Railroad Company*". (Record, page 35). When a legislative grant is drawn by the party interested, the strictest rule of construction will be applied and no rights of the state will be deemed to pass by inference or presumption.

Blair vs. Chicago, 201 U. S., 400.

In that case the Court said:

> "Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. *It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the Legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give.* This is one among many reasons why they are to be strictly construed."

IV.

The Act of 1869 Could Not Constitute a Contract Unless It Were an Amendment to the Charter of the Rochester City & Brighton Railroad Company, and If It Became a Part of the Charter of That Company It Was Subject to Amendment, Alteration or Repeal at the Will of the Legislature.

If the act of 1869 were passed merely as a gratuity to relieve a railroad constructed and in operation from burdens imposed upon it by its franchise, certainly it did not constitute a contract with the Railroad Company and the only way in which it could be held to be a contract would be by giving effect to it as an amendment to the Charter of the Company, and if it became a part of the charter of the Rochester City & Brighton Railroad Company, it was subject to alteration, amendment or repeal.

The New York Constitution of 1846 (Art. 8, §1) provides that "corporations may be formed under general laws, but shall not be created by special act except for municipal purposes and in cases where in the judgment of the Legislature the object of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

The General Railroad Statute, under which the Rochester City & Brighton Railroad Company was incorporated (Laws of 1850, Chap. 140, §1) provides that all persons who have subscribed articles of association shall be a corporation and shall "be subject to the provisions contained in Title 3 of Chapter 18 of the first part of the Revised Statutes, except the provisions contained in the seventh section thereof."

Title three, Chapter 18 of the first part of the Revised Statutes, §8 provides as follows:

> "The charter of every corporation that shall hereafter be granted by the Legislature, shall be subject to alteration, suspension or repeal in the discretion of the Legislature."

§48 of Chapter 140 of the Laws of 1850 contains the following provision:

> "The Legislature may at any time annul or dissolve any corporation formed under this act."

The Legislature of the State of New York under its reserved right had the right at any time to amend, alter or repeal the charter of the Rochester City & Brighton Railroad Company, and to impose further and additional duties and burdens upon it.

Sioux City Street Railway Company vs. Sioux City, 138 U. S. 98.

The People ex rel. Schurz vs. Cook, 148 U. S., 397.

Stanislaus County vs. San Joaquin, 192 U. S., 201.

V.

The Plaintiff in Error If It Acquired from the Rochester City & Brighton Railroad Company Any Immunity from Paying the Cost of Paving, Has Contracted That Right Away and Has Waived It by Extending Its Railroad Under the Provisions of the Present Railroad Law.

The plaintiff in error contends that this question cannot be reviewed by this Court, but this Court will always determine for itself the existence or non-existence of a contract which is claimed to have been impaired, and if a different contract has been substituted, or the one claimed to have been impaired has been waived or abandoned, the former contract does not exist and so cannot be impaired, and necessarily this Court must first determine whether there is a contract to be impaired; and in this case before that question can be determined, it must be decided whether or not the alleged contract relied upon by the plaintiff in error has been wiped out of existence by another contract, or by waiver.

A contract may be abandoned by the execution of a later contract.

> *U. S. International Contracting Company vs. Lamont,* 155 U. S., 303.

All rights whether arising from contract, statute or a constitution may be waived.

> *Peopde ex rel. McLaughlin vs. Police Comrs.,* 174 N. Y., 450-456.

On the 11th day of December, 1894, the plaintiff in error presented to the Common Council of the City of Rochester a petition praying for the location of its tracks, saying that there was some doubt as to whether

they legally existed in their present location. (Record, pages 47, 48) The Common Council on the 31st day of December, 1894 passed an ordinance confirming the location of the tracks of the plaintiff in error upon certain conditions, and directed that a contract be entered into between the city and the Rochester Railway Company in accordance with the provisions of the resolution. (Record, page, 48.)

Thereafter a contract was entered into in which the Railway Company agreed "to accept, and in each and every thing and particular, well and truly comply with each and all of the provisions and conditions contained and made in the following and accompanying resolutions as adopted by the Common Council of said city on the 31st day of December, 1894." (Record, page 49.) Annexed to and made a part of the contract was the resolution of the Council ratifying the location of the railroad and tracks of the plaintiff in error, upon the following conditions:

> First—That the provisions of Article Four of the Railway Law of the State of New York, being an act in relation to railroads, constituting Chapter 39 of the General Laws of the State of New York, be complied with."

Article Four of the Railroad Law at that time contained §98 thereof which reads as follows:

> "Every street surface railroad corporation so long as it shall continue to use any of its tracks in any street, avenue or public place in any city or village shall have and keep in permanent repair that portion of such street, avenue or public place between its tracks, the rails of its tracks and two feet outside of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so, and in such manner as they may prescribe." (Chap. 565 of Laws of 1890, as amended by Chap. 676 of Laws of 1892.)

The resolution of the Common Council ratifying the location of plaintiff in error's tracks and the contract entered into pertaining thereto, contained a provision that all former ordinances, grants and resolutions in relation to street railroads should remain in force. (Record, page 51.) But, of course, this can be construed as meaning all former agreements and ordinances so far as not inconsistent with the contract in which they were contained. If it had been intended that the ordinance and contract should not impose upon the Railway Company the duty of complying with Article Four of the Railroad Law, this clause would have been stricken out. The fact that it was allowed to remain shows that it was intended to have force and effect, and the special provision imposing the duty upon the railroad company of complying with Article Four of the Railroad Law should be construed as an exception to the general provision as to the repeal of former ordinances and thus force and effect will be given to all the words of the contract and ordinance.

It is a well settled rule of construction of contracts and statutes that special provisions will not be held to be limited or modified by general provisions later appearing, and that the particular provision will be construed as an exception to the general provision.

Wormser vs. Brown, 149 N. Y., 165-170.

It is conceded that after the passage of Chapter 252 of the Laws of 1884, the Rochester City & Brighton Railroad Company obtained from the municipal authorities of the City of Rochester various consents to extend its tracks "on the express conditions that the provisions of Chapter 252 of the Laws of 1884 pertinent thereto shall be complied with;" and that the plaintiff in error since it acquired the property and franchises of the Rochester City & Brighton Railroad Company has received from the municipal authorities of the City of

Rochester various consents to extend its railroad in the various streets in the City of Rochester upon condition "that the provisions of Article Four of the Railroad Law pertinent thereto shall be complied with." (Record, pages 46, 47).

Chapter 252 of the Laws of 1884, §9, provides:

> "Every such corporation incorporated under, or constructing *extending* or operating a railroad constructed or *extended* under the provisions of this act within the incorporated cities and villages of this state" shall keep in permanent repair between the tracks and two feet outside thereof.

Chapter 565 of the Laws of 1890, §90 provides:

> "A corporation organized for the purpose of building and operating or *extending* a street railroad or any of its branches, for public use in the conveyance of persons and property in cars for compensation, upon and along any street, avenue, road or highway, in any city, town or village, or in any two or more civil divisions of the state, must comply with the provisions of this article."

§98 of the same article provides:

> "Every such corporation so long as it shall continue to use any of its tracks in any street, avenue or public place in any city or village, shall have and keep in permanent repair, etc."

Thus the laws under which both the Rochester City & Brighton Railroad Company and the plaintiff in error have made extensions, provide that any railroad corporation making such extensions should be bound thereby, and should be obliged to pave certain portions of streets through which their railroads run, and the companies having both availed themselves of the privileges granted by this act must be also subject to the liabilities imposed thereby.

VI.

It Is Respectfully Submitted That the Judgment of the Supreme Court of the State of New York Should Be Affirmed.

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